INDEX.

	PAGE
Question Presented	2
Statement	2
Argument	4
Conclusion	9

CITATIONS.

Cases:

Albrecht v. N.L.R.B., 181 F. 2d 652 (7th Cir. 1950)	7
A.F.L. v. N.L.R.B., 308 U. S. 401 (1940)	5, 6
Bandlow v. Rothman, 278 F. 2d 866 (D. C. Cir. 1960)	7
Cameron & Franks v. N.L.R.B., 207 F. 2d 775 (6th Cir. 1953)	6
General Drivers v. N.L.R.B., 179 F. 2d 492 (10th Cir. 1950)	7
Hourihan v. N.L.R.B., 201 F. 2d 187 (D.C. Cir. 1952), *cert denied*, 345 U. S. 930 (1953), *rehear'g denied*, 345 U. S. 961 (1953), 346 U. S. 843 (1953), 346 U. S. 880 (1953), 346 U. S. 917 (1953)	7
Inland Container Corporation v. N.L.R.B., 137 F. 2d 642 (6th Cir. 1943)	6
Irwin-Lyons Lumber Co., 83 N.L.R.B. 341 (1949)	8
Leedom v. Kyne, 358 U. S. 184 (1958)	7
Lincourt v. N.L.R.B., 170 F. 2d 306 (1st Cir. 1948)	6, 7
Manhattan Construction Company v. N.L.R.B., 198 F. 2d 320 (10th Cir. 1952)	6
Moyer & Pratt v. N.L.R.B., 208 F. 2d 624 (2nd Cir. 1953)	6
N.L.R.B. v. International Brotherhood of Electrical Workers, 308 U. S. 413 (1940)	6

N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, 119 N.L.R.B. 594 (1957), 121 N.L.R.B. 1207 (1958), 272 F. 2d 713 (2nd Cir. 1959) *aff'd* 364 U. S. 573 (1961) 4, 5

N.L.R.B. v. United Association of Journeymen, 242 F. 2d 722 (3rd Cir. 1957) 4

N.L.R.B. v. United Brotherhood of Carpenters, 261 F. 2d 166 (7th Cir. 1958) 4

Thompson Products v. N.L.R.B., 133 F. 2d 637 (6th Cir. 1943) 7

Utah Copper Co. v. N.L.R.B., 136 F. 2d 485 (10th Cir. 1943) 7

Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205 (7th Cir. 1960) 7

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*)

Sec. 8 (b) (4) (D) 2, 3, 4, 5, 6

Sec. 9 6

Sec. 10 (b) 6

Sec. 10 (e) 6

Sec. 10 (e) 6

Sec. 10 (f) 2, 3, 6, 7

Sec. 10 (k) 2, 3, 4, 5, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 879

G. A. RAFEL & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; FRANK BENNER and ROBERT FITZGERALD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; FRANK BENNER AND ROBERT FITZGERALD IN OPPOSITION.

QUESTION PRESENTED.

Is an order of the National Labor Relations Board quashing a notice of hearing under Section 10 (k) of the National Labor Relations Act, as amended, a final order so as to make it reviewable under the provisions of 10 (f) of said Act?

STATEMENT.

Petitioner herein filed unfair labor practice charges against Local Union No. 9, International Brotherhood of Electrical Workers, AFL-CIO and Frank Benner and Robert Fitzgerald, its agents, hereinafter, for convenience, collectively referred to as the "Union". The charge alleged that the Union had induced and encouraged a strike with the object of forcing Petitioner to assign work to the Union in derogation of the members of another group, *i. e.*, a jurisdictional dispute. Petitioner claimed that the Union had violated Section 8 (b)(4)(D) of the Act. Pursuant to the provisions of Section 10 (k) of the Act, the Board's Regional Director issued a notice of hearing and a hearing was held in accordance with the procedures outlined in said Section. The Board reviewed the Record adduced at the Section 10 (k) hearing and appropriately noted that "Before the Board may proceed with a determination of a dispute pursuant to Section 10 (k) of the Act it must be satisfied that there is *reasonable cause* to believe that Section 8 (b)(4)(D) has been violated [Pet. App., pg. 10 (a)] (Italics supplied). This was the statutory purpose of the Section 10 (k) proceedings. The Board noted that in order to find "reasonable cause" there must be some evidence adduced at the hearing that there was (a) inducement or encouragement and (b)

that such inducement or encouragement was for the proscribed object of forcing a work assignment to one group as distinguished from another [Pet. App., pgs. 10 (a) 11 (a)]. It concluded that "the dispute in this case is not over the assignment of work within the meaning of Section 8 (b)(4)(D)." [Pet. App., pg. 11 (a)]. It held, therefore, that this was not a dispute within the meaning of Section 10 (k) of the Act and accordingly, quashed the Notice of Hearing [Pet. App., pg. 11 (a)].

Review was then sought in the Court of Appeals for the Seventh Circuit under Section 10 (f) of the Act, which Section encompasses the statutory scheme created by Congress for obtaining judicial review of *final orders* of the National Labor Relations Board. On motion of the Union and the National Labor Relations Board, the Court of Appeals dismissed the Petition for Review on the ground that a National Labor Relations Board "order quashing a notice of hearing under Section 10 (k) of the National Labor Relations Act, . . . does not constitute a final order subject to review by this Court" [Pet. App., pg. 13 (a)].

ARGUMENT.

In seeking certiorari, Petitioner relies upon a decision of this Court issued on January 9, 1961 (*National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212*, 364 U. S. 573). There, this Court was confronted with the question of whether or not the Board was under a duty to award jurisdiction and the assignment of work to one of two competing unions before it could issue a cease and desist order in conjunction with finding a union guilty of violating Section 8 (b)(4)(D) of the Act. The Second Circuit [272 F. 2d 713 (1959)] refused to enforce the cease and desist order, agreeing with the respondent's contention and that of the Third[1] and Seventh[2] Circuits that the Board, having failed to make a jurisdictional determination under Section 10 (k) of the Act, could not proceed to enforce a cease and desist order growing out of a claimed violation of Section 8 (b)(4)(D). This Court, in reviewing the legislative history of Section 10 (k) noted that this section imposed upon the Board the compulsory determination of jurisdictional disputes.

Based upon the foregoing, Petitioner now contends that an order of the Board quashing a notice of hearing—as distinguished from a cease and desist order after a trial has been held under Section 8 (b)(4)(D) of the Act—is a final order within the meaning of the Act and, therefore, subject to review. Clearly, the *Radio and Television Broadcast Engineers* case did not so hold. An examination of the

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[1] *National Labor Relations Board* v. *United Association of Journeymen*, 242 F. 2d 722 (3rd Cir. 1957).

[2] *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 261 F. 2d 166 (7th Cir. 1958).

procedural facts in the matter and this Court's opinion reflects no support for Petitioner's claim. *Radio and Television Broadcast Engineers* commenced with a Section 10 (k) proceedings. Though it made no jurisdictional assignment, the Board initially issued a decision and determination of the dispute [119 NLRB 594 (1957)] holding that the respondent union therein was not entitled to force a work assignment; it directed the respondent to advise the Regional Director whether or not it would refrain from such activity. **This was the investigatory prelude to an unfair labor practice hearing under Section 8 (b) (4) (D) of the Act.** The respondent union chose not to comply and the hearing was then held after which the Board issued its cease and desist order [121 NLRB 1207 (1958)]. The enforcement which the Court of Appeals denied did not derive from the investigation conducted under Section 10 (k), but was solely the result of the cease and desist order following a formal hearing wherein the Board found the respondent union guilty of violating Section 8 (b)(4)(D) of the Act. As distinguished from the *Radio and Television Broadcast Engineers* case, the instant matter merely involved an order quashing the notice of a Section 10 (k) hearing. There had been no formal hearing relative to a claimed Section 8 (b)(4)(D) violation. The Board simply held—as the result of its investigation—that there was insufficient basis of a violation. This order of the Board quashing the Notice of Hearing is identical to the refusal of the Regional Director to issue a complaint when he finds insufficient basis of a violation.

It is a *sine qua non* that the jurisdiction to review actions of administrative agencies is legislatively and specially conferred [*AFL* v. *NLRB*, 308 U. S. 401, 404 (1940)]. Reviewability is treated in two sections of the Act and in two sections only. Except for the method of initiation of re-

view, the sections are basically identical. Section 10 (e) of the Act provides for enforcement in a Court of Appeals on a petition brought by the Board and Section 10 (f) permits an aggrieved party to bring a petition seeking review. In each instance, that which is sought to be reviewed must be a *final order* of the Board. And, clearly, a *final order* is an "order entered as the culmination of the procedure described in Section 10 (b) and (c) of the Act" [*Lincourt* v. *NLRB*, 170 F. 2d 306 (1st Cir. 1948)]. The quashing of a notice of hearing in a Section 10 (k) investigation is not such a "final order". It is no more final than the refusal to issue a complaint. The culmination of the procedure described in Section 10 (b) and (c) of the Act would be any orders of the Board growing out of its decision in a Section 8 (b)(4)(D) trial—whether those orders be of a cease and desist variety or whether the Board merely orders that the *complaint* be dismissed.

In passing, it is to be noted that the present Petition presents no novel question or one of substantial import. In fact, there is no disagreement between the Circuits, and the holding in the instant case is consistent with that which has been held universally. Illustratively, the Tenth Circuit has similarly held that the quashing of the notice of hearing under Section 10 (k) of the Act and the consequent refusal to issue a complaint under Section 8 (b)(4)(D), as here, did not constitute a reviewable final order [*Manhattan Construction Company* v. *NLRB*, 198 F. 2d 320 (10th Cir. 1952)]. Similarly, representation cases under Section 9 of the Act [*AFL* v. *NLRB*, 308 U. S. 401 (1940), *Cameron & Franks* v. *NLRB*, 207 F. 2d 775 (6th Cir. 1953), *Mower & Pratt* v. *NLRB*, 208 F. 2d 624 (2nd Cir. 1953)], and matters relating to representation cases are non-reviewable [*NLRB* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413 (1940); *Inland Container Corporation* v.

NLRB, 137 F. 2d 642 (6th Cir. 1943); *Utah Copper Co.* v. *NLRB*, 136 F. 2d 485 (10th Cir. 1943)].[3] More germane to the instant inquiry, the Board's refusal to issue complaints in unfair labor practice cases is similarly non-reviewable [*Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950); *Baudlow* v. *Rothman*, 278 F. 2d 866 (D. C. Cir. 1960); *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205 (7th Cir. 1960); *see also*, *Thompson Products* v. *NLRB*, 133 F. 2d 637 (6th Cir. 1943)].[4]

It is apparent that the instant Petition is based upon the Petitioner's confusion relative to the difference between the *refusal* to issue a complaint and the *dismissal* of a complaint. For example, Petitioner states that "It has been held on numerous occasions that a dismissal of an unfair labor practice complaint is reviewable under Section 10 (f)" (page 9). And to substantiate this, Petitioner relies upon the case of *Albrecht* v. *NLRB*, 181 F. 2d 652 (7th Cir. 1950). *Albrecht* involved an appropriate review following the issuance of a complaint, a hearing and the subsequent order of the Board dismissing the complaint, in part. It did not involve the refusal to issue a complaint. The words "refusal to issue" on the one hand and "dismissal" on the other

[3] These cases are, of course, to be distinguished from that of *Leedom* v. *Kyne*, 358 U. S. 184 (1958) involving an original suit brought in the district court to vacate a bargaining unit determination made by the Board in excess of its powers.

[4] *See also*, *Hourihan* v. *NLRB*, 201 F. 2d 187 (D. C. Cir. 1952), *cert. denied*, 345 U. S. 930 (1953), *rehear'g denied*, 345 U. S. 961 (1953), 346 U. S. 843 (1953), 346 U. S. 880 (1953), 346 U. S. 917 (1953), involving an unsuccessful attempt to obtain the issuance of a complaint by way of mandamus.

hand take on special meaning. True, the refusal to issue is a dismissal—but it is a dismissal of the *charge* following a preliminary investigation. The dismissal of a complaint, on the other hand, occurs following a plenary hearing. There the dismissal is based upon the merits and merely holds that the General Counsel did not substantiate his burden of proving that there had been a violation of the Act. This latter type of dismissal of a complaint is reviewable; the dismissal of a charge—whether it be called a refusal to issue or labeled the quashing of the notice of hearing—is clearly non-reviewable. The Section 10 (k) proceeding is nothing more than the preliminary administrative investigation and determination made for the purpose of attempting to resolve a dispute initially, or thereafter proceeding on the basis of an unfair labor practice hearing with full and complete litigation before a Trial Examiner, with review before the Board and with the right to have review then in a Court of Appeals. (See Board explanation in *Irwin-Lyons Lumber Co.*, 83 NLRB 341 (1949). While Section 10 (k) involves an interim step—designed to attempt to resolve inter-union disputes—in its ultimate form, it is no different than the conventional unfair labor practice investigation. As this Court has stated, the provisions of Section 10 (k) and the intent desired to be accomplished are exceedingly clear. It would certainly be reasonable to assume that if Congress had intended that the Section 10 (k) investigation be treated in terms of reviewability differently from the other investigations and refusals to issue complaints in unfair labor practices, then Congress in drafting Section 10 (k) would have so stated. Clearly, it did not so state, and clearly the Act does not permit the construction of the reviewability of non-final orders when jurisdiction to review acts of administrative agencies occurs by reason of legislative enactment alone.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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